

NOTE: The Office of the Attorney General must be consulted before finalizing a decision to appeal a land-use determination by a local agency.¹ There are short timelines in which to file appeals; so, the AGO must be contacted as soon as an appeal is considered. A time delay could prejudice WSDOT'S right to appeal.

7.1.01 Purpose Of SEPA Appeals Chapter

Occasionally the land use proposal proponent will appeal a WSDOT requested SEPA mitigation. On a few other occasions the WSDOT has appealed a lead agency's SEPA decision. This chapter was prepared to assist the Region and their Development Services staff to better understand the SEPA appeal process of local land use decisions.

This chapter includes steps on how to work with local governments to resolve issues short of an appeal. It also covers how to prepare for an appeal to ensure the WSDOT has a good chance of a successful outcome.

7.1.02 Reaching A Successful Decision

There is often a built-in conflict between what the local government or developer wants for its community and what WSDOT needs for the state highway system. Balancing the needs of the state highway system with the local land use regulatory framework calls for working closely with local governments and developers.

All parties need to openly discuss their positions, paying particular attention to the distinction between what is required versus what is desired. Often, a middle ground can be reached that satisfies all. From the WSDOT perspective, coordination entails working with and educating the local agency personnel and developers on the legal and policy framework within which WSDOT works. In fact, in most cases a successful compromise that satisfies all parties' needs can be reached prior to an appeal.

It is a delicate matter to look at each case individually and still provide an overall consistent message from one land use application to another. In some situations it will not be possible to reach a mutually successful conclusion. For example, a developer may not be willing to mitigate for the traffic increase it will generate. On other occasions, though less frequent, the lead SEPA agency may not be willing to support the WSDOT requested SEPA mitigation. For those instances where a SEPA land use appeal is inevitable, this chapter provides the tools to ensure a successful appeal.

See Appendix 3 for "Significant Court Case Decisions Affecting the Development and Access Control."

7.1.03 Why Appeal?

The WSDOT, as a state agency that may be directly impacted by a local governmental land use action decision, has an obligation to appeal that local governmental land use decision if it will adversely affect the state transportation system. An appeal is first brought at the local level or administrative level, and if unsuccessful, further action may be taken in the court system.

¹ Contact Elizabeth Lagerberg, AAG for Development Services.

A consistent approach to land use appeals is important. This chapter provides the major factors used to make the decision whether to appeal in a specific instance. It also outlines the basic internal coordination process to verify the appropriateness of an appeal.

While an appeal is an option that the WSDOT may eventually choose, the WSDOT's intent is to avoid or minimize appeals of local land use decisions and strive to solve these issues within the local land use process, short of an appeal. The combination of working with all interested parties and the state's ability to appeal when WSDOT issues are not adequately considered has kept appeals to a minimum. WSDOT's option to appeal has resulted in many productive discussions that have led to agreements and solutions. The judicious use of appeals is a very important tool for WSDOT in protecting transportation interests and investments throughout the state.

7.1.04 Underlying Governmental Action—What Is It?

The underlying governmental action is the action that must be taken by an agency to authorize a proposal. Actions include the issuing of a permit or license, the approval of funding, the adoption of a plan, ordinance, or rule, or other actions defined in the SEPA Rules.

7.1.05 Appeal Requirements For Counties And Cities

Under the Local Project Review Chapter (Chapter 36.70B RCW), each county and city is allowed to have no more than one "open record hearing" and one "closed record appeal" on the underlying governmental action (e.g. permit decisions).

An "open record hearing" is a hearing, conducted by a single hearing body or officer authorized by the local government to conduct such hearings, that creates the local government's record through testimony and submissions of evidence and information, under procedures prescribed by the local government by ordinance or resolution. An open record hearing may be held prior to a local government's decision on a project permit to be known as an "open record predecision hearing." An open record hearing may be held on an appeal, to be known as an "open record appeal hearing" if no open record pre-decision hearing has been held on the project permit.

A "closed record hearing" is an administrative appeal on the record to a local government body or officer, including the legislative body, following an open record hearing on a project permit application when the appeal is on the record with no or limited new evidence or information allowed to be submitted and only appeal argument allowed.

In summary, an open record hearing is one at which testimony is received and a record is created. A closed record appeal is based on the record created at the open hearing with no or limited new evidence or information.

An open record hearing can be either:

A pre-decision hearing (held prior to county/city's decision to approve or deny a project), or An appeal hearing (held after the decision).

If the county or city allows a SEPA administrative appeal, the appeal must be heard at the open record hearing. Any SEPA appeal (procedural or substantive) that is not heard at the open record hearing of the underlying governmental action may not be later considered in a subsequent local hearing.

Agencies should be particularly aware of the consolidation requirements if they have chosen to hold open record pre-decisional hearings. The SEPA substantive determinations (project denials or attachment of mitigating conditions) are not made until the agency makes its decision on the underlying governmental action (e.g. permit approval). Since an agency cannot hold a second open record hearing on the SEPA substantive determinations (if an agency allows for substantive SEPA appeals), it is essential that testimony on substantive SEPA issues be allowed at any pre-decision hearing. This hearing is the only time for an administrative appeal of substantive issues and creates the record for any subsequent closed record to a local legislative body. Administrative appeals offered by counties or cities must also comply with the time limits set in RCW 36.70B.110.

The limitation on appeals restricts the practice of filing one appeal after another to delay a proposal.

7.1.06 Procedural Appeals and Substantive Appeals

SEPA provides a process for citizens and others, including the WSDOT, to challenge both procedural and substantive decisions made under SEPA.

Procedural appeals include the appeal of a threshold determination – both determinations of significance (DS) and nonsignificance (DNS) – and of the adequacy of a final environmental impact Statement (EIS).

Substantive appeals are challenges of an agency's use, or failure to use, SEPA substantive authority to condition or deny a proposal. SEPA substantive authority is the regulatory authority granted to all state and local agencies under SEPA to condition or deny a proposal to mitigate environmental impacts identified in a SEPA document.

7.1.07 Level of Appeals

Appeals may also be heard at two levels:

- Administrative appeals, heard by agencies; and
- Judicial appeals, which are heard by courts when the administrative appeal process is either not available or has been exhausted.

Administrative appeals, when offered, provide the first opportunity to appeal a SEPA decision and are normally used before the judicial appeal process. However, not all agencies provide an administrative appeal process, or they may provide for a substantive appeal or a procedural appeal but not both. In this case, the first appeal may be a judicial appeal.

Anyone interested in appealing a SEPA procedural issue should contact the lead agency to determine what administrative appeal, if any, will be allowed. Questions on the availability of administrative appeals for substantive decisions should be directed to the agency that made the decision (i.e. to deny, condition, or not to condition a permit or other approval).

Appeals will almost always require a fee. The appeal fee will usually range from about \$100 to over \$1000 depending on the jurisdiction involved.

7.1.08 Administrative Appeals

Each SEPA agency must decide whether or not to offer administrative appeals. If an agency offers an administrative appeal, the agency must specify its appeal procedure by ordinance, resolution, or rule.

An agency may provide appeals of some but not all reviewable SEPA decisions. The only decisions that may be appealed at the agency level are a final threshold determination or EIS (including a final supplemental EIS), and SEPA substantive decisions. Other decisions, for example the applicability of categorical exemptions, may only be appealed to the courts.

A DS, DNS, or EIS are each subject to a single administrative appeal proceeding. Successive reviews within the same agency are not allowed. For example, a Hearing Examiner's decision on the appeal of a DS cannot be further reviewed by the local legislative body. Further consideration is limited to review by a court as part of a judicial appeal.

Procedural and substantive SEPA appeals in most instances must be combined with a hearing or appeal on the underlying governmental action (such as the approval or denial of a permit). If a SEPA appeal is held prior to the agency making a decision on the underlying action, it must be heard at a proceeding where the person(s) deciding the appeal will also be considering what action to take on the underlying action.

SEPA appeals that do not have to be consolidated with a hearing or appeal on the underlying action are related to:

- A determination of significance (DS)
- An agency proposal
- A non-project action, or
- The appeal of a substantive decision to local legislative bodies.

A local agency must also decide whether or not to allow an appeal of a non-elected official's decision to use SEPA substantive authority to condition or deny a proposal. If the local agency chooses not to allow an appeal to a local legislative body, the agency must clearly state that decision in its procedures.

While an administrative appeal does not require the assistance of the Attorney General's Office (AGO), the legal advice and direction provided by the AGO may be very helpful if an administrative appeal is pursued.

7.1.09 Judicial Appeals

Judicial appeals are those appeals heard in court. A judicial appeal in most instances must be of the underlying governmental action (permit decision, adoption of a regulation, etc.) and the SEPA document (DNS or a final EIS). If the agency allows a SEPA administrative appeal, it must be used prior to initiating judicial review.

The time limit for filing a judicial appeal will depend on several factors:

- Time limit on underlying governmental action (issuance of permit, adoption of a plan, etc). If there is a time limit established by statute or ordinance for appealing the underlying governmental action, then appeals raising SEPA issues must be filed within that time frame.
- Time limit with optional notice of action. If there is no time limit for appealing the underlying governmental action, the notice of action in RCW 43.21C.080 may be used to establish a 21-day appeal period.

If there is no time limit for appealing the underlying governmental action and the notice of action is not used, then the SEPA does not provide a time limit for judicial appeals. However, the general statutes of limitation or the common law may still limit appeals. The limitation on appeals restricts the practice of filing one appeal after another to delay a proposal.

All judicial appeals involving the WSDOT are handled under the direction and guidance of the Attorney Generals Office (AGO).

7.1.10 Participating in the Local Land Use Process Prior to an Appeal

Conveying WSDOT's position early in the SEPA review process gives the applicant and interested parties time to work out solutions. As solutions are sought, the Development Services staff member is responsible for leading the effort to establish the framework for a successful appeal. Before an appeal is ever considered, it is the Development Services staff who has established the relationships, built the record, established standing to appeal by appearing before the local government either in person or in writing, and basically set the stage for the final outcome of an appeal. Much of the work for a successful appeal is completed before the appeal is even contemplated, which is why it is important to establish a set of best practices, including developing and keeping a record, writing good findings and keeping track of the various other permit issues that may be related to the land use appeal.

There are several important aspects of "keeping on top" before an appeal occurs. They are:

- Recognizing when a land use decision is potentially contrary to WSDOT's interests.
- Establishing "standing" in a land use case in order to preserve the right to appeal.
- Knowing related procedures that could impact the outcome of a land use decision, including access management issues.
- Knowing the hearing date scheduled for the appeal.
- Compiling complete and accurate data, maps, traffic impact studies, correspondence, findings and other information for the local government record.
- Having the right WSDOT staff "up to speed" and ready to testify at a hearing such as the Region Traffic Engineer.
- Knowing the local jurisdiction's procedural requirements for appearing at hearings and getting information into the local government record.
- Recognizing a "final decision."
- Knowing when to contact your Attorney General's Office (AGO) representative to preserve WSDOT's right to appeal or to seek their assistance and guidance.

If the WSDOT is the party appealing, then the Attorney's General's Office will prepare the legal documents for the appeal, and assist in any mediation or negotiation processes. However, it is still up to the Development Services staff to work closely with the AGO on the preparation of the documentation needed for the WSDOT requested appeal.

7.1.11 Questions To Ask To Determine If The WSDOT Should Appeal

Deciding if the WSDOT should appeal a SEPA land use decision is a very tough decision to make. A lot of thought must go into the decision on whether to appeal or not. Appeals can be very time consuming and expensive when you add up the time and resources necessarily to properly prepare for and present at an appeal. If the WSDOT decides to appeal, it is generally because the local SEPA lead agency has made a final decision that is significantly contrary to WSDOT's interests.

Before deciding to appeal a local land use decision, region staff should go through a series of questions. These questions relate to previous steps taken to resolve the conflict, whether the land use decision is inconsistent with or violates existing plans, rules or statutes, and the risk of precedence. Specific questions are as follows:

- Are the proposed actions of the case inconsistent with SEPA, WSDOT policy, Highway Access Management, adopted state transportation plans, or local transportation and comprehensive plans?
- Will a ruling in the case provide needed interpretation of ambiguous statute or rule?
- Has staff worked diligently with property owners, developers and local governments to reach acceptable solutions that minimize the conflicts with state transportation plans and adopted standards?
- Is there another way to resolve the conflict, such as dispute resolution or technical assistance? Are the applicants willing to delay the land use decision?
- Has the Attorney General's Office (AGO) been contacted for legal advice and direction?
- Would the decision result in development that would negatively affect the safety or operation of the state transportation system?
- Does the decision to appeal have region management support?

7.1.12 Important Tips in Preparing for an Appeal

Managing the state's transportation system is becoming more expensive and more difficult to fund with continued growth and development pressures adding to a system that, in many locations, is already beyond capacity. Add to this the recognition that the legal and regulatory arena in which WSDOT operates is becoming increasingly complex.

This section outlines some of the lessons learned to prepare for and survive a legal challenge.

1. **Understand the action.** Recognize that there may be separate ongoing issues, such as a permit application and a zoning change application. Be able to separate these distinct concurrent processes. For example, access management negotiations and land use actions may be taking place at the same time, with the same people. The hearing may only be about the land use actions, not the access management issues. It is important to be able to separate the issues in order to know which information is important to which issue. Make sure the information pertinent to the legal action is made part of the record.
2. **Know the timelines.** Do not miss filing deadlines or other due dates. The lead SEPA agency may have set specific dates for when information is required of the WSDOT. Missing due dates may not only cause information to not be allowed to be submitted, it can also delay or hurt the lead agency's preparation for a hearing.

3. The record.

- a. **Know the contents of the record.** It is important to know the entire contents of the local government record, including maps, previous plan amendments, local government decisions, WSDOT actions and any other relevant material. Knowledge of the contents of the record is particularly important when an opponent tries to enter information that is new or different from the record. If WSDOT is unaware of the contents of the record, it is at a disadvantage in keeping out incorrect, misleading or irrelevant information.
 - b. **Build the record.** Do not assume that the local government will build the record for WSDOT. The local government's interest may not necessarily be the same as WSDOT's. WSDOT staff should go to the city or county to review the record.
 - c. **Make sure the TIA is in the record.** Ask the consultant to provide two copies, one for the office and one for the appeal record.
 - d. **Get the entire record.** In some instances, there may be several phases to an application or legal issue. Be sure that the records and documentation from the earlier phases are included in the record. These earlier phases may contain records and information critical to the present issue.
4. **Local Approval Criteria.** Written or oral responses must include how the development fails to meet the local approval criteria. WSDOT must specifically identify the provisions where it believes that the proposal does not comply, explain how the Department reached that conclusion, and may need to submit additional technical data.
 5. **Develop a narrative or outline of WSDOT's interests.** Take the time to establish, in clear language, WSDOT's interests in the matter. Do not assume that the hearings officer, judge, opposing parties or anyone else involved in the case understands WSDOT's position. For example, if there is an ongoing access connection permit issue and a land use issue, describe each, clarify which issue is before the tribunal, describe the data or information pertinent to the hearing and, most important of all, describe the results that WSDOT wants. Describe the state's interests in mobility, safety or whatever the issue may be. Do not describe the detail without explaining where the detail fits into the overall picture.
 6. **Use good visual aids.** Make sure to have good visual aids, including accurate maps, as part of the record and for presentations to the hearings body.
 7. **Cite SEPA** whenever a land use change significantly affects the state highway.
 8. **Become familiar with the local jurisdiction's codes and ordinances.** There may be procedural or substantive requirements in the code that could harm WSDOT's interests, or on the other hand, it could be that the local jurisdiction did not comply with their own code provisions, which could be a benefit to WSDOT.
 9. **Coordinate internally throughout the process.** Develop a method or process for internal WSDOT coordination. For example, if right-of-way is also involved in an aspect of the process, make sure that there is some form of frequent communication so that you know when and if another WSDOT section is taking action that could impact the outcome of the appeal. It is important to identify specific outcomes to other branches.
 10. **Develop tools to protect WSDOT's interests during phased development.** If the action is to take place in phases, develop some way to enforce the limitations to development of later phases until after the earlier phases have met the requirements.

11. **Balance WSDOT and developer expectations.** Look at the big picture. For example, do Developer Agreement highway improvements need to be completed before the land use proposal should obtain their Certificate of Occupancy (CO) from the local jurisdiction? Is there a way in which the developer can obtain the CO prior to completion of the highway improvements? WSDOT needs to be flexible while working with both the local jurisdiction and developers in completing the highway improvements.
12. **Document, document, document.** Keep notes of conversations, meetings, decisions and phone calls. Document everything you and everyone associated with the action says. A note made today may save you a lot of time and headaches at a future date.
13. **Continue to try to resolve the issue with the applicant.** Learn, understand and use all available means for alternative dispute resolution. Remember that resolving a dispute short of judicial resolution does not mean, “giving in” on important issues. WSDOT may have some room to maneuver or the developer may agree to modify the site plan or land use.
14. **Learn how to use citations.** It is important to correctly cite various statutes, rules, codes and other documentation. For example, SEPA, Highway Access Management, WSDOT policy, zoning codes, etc.
15. **Knowledge is power.** Become familiar with and know the facts and history of the action. Sometimes a case can turn on what one might perceive to be a tiny technical detail. Being familiar with the case and the record will allow representatives for the agency to know when the opposing party’s argument is specious, or just incorrect. If you know the details of the case, you will be able to keep the record straight with more confidence and credibility.

7.1.13 The Petitioner, The Respondent, And The Court

There are always at least three parties involved in a land use appeal beyond the local appeal process: the petitioner, the respondent and the court.

- The petitioner is the complaining party who files the action with the court.
- The respondent is the party being sued, who responds to the complaint.
- The court is the forum where the arguments will be heard and a ruling will be made.

WSDOT is almost always the respondent in land use appeals, defending an action that was requested by the WSDOT of the petitioner through the local lead SEPA agency process. However, the WSDOT can also be the petitioner. WSDOT can also be involved in legal action outside of the courts and those actions are handled differently. An example would be a Highway Access Management Adjudicative Proceeding.

7.1.14 Standing To Appeal

To appeal a SEPA decision, WSDOT must establish “standing” to appeal the local decision. WSDOT has standing to appeal a land use decision if it “appeared before the local government, special district or state agency orally or in writing”. Standing to appeal may be achieved either through oral testimony (speaking at the hearing – it is not enough to merely show up) or in written form, through a memorandum, letter, petition or other document. The written document must be submitted to the local government during the course of the proceedings before the record is closed. The record is typically closed during the hearing before the hearings body deliberates on its decision.

7.1.15 Exhaustion Of Administrative Remedies

Before a judicial appeal can be filed, the petitioner must “exhaust all administrative remedies”. This means that WSDOT has followed all local government administrative requirements and has appealed the decision to the highest decision-maker at the local level. It is important to know the local government’s decision-making structure and follow it to the letter.

7.1.16 “The Record”—What Is The Record And Why Is It Important?

The “record” is the formal file made before the city, county, or state agency whose decision is appealed. The record is the recorded oral testimony and written documentation submitted to the decision-maker upon which an appeal decision will be based. The responsibility for preparing the record is on the local government. However, it is important for the Development Services staff member to see that the record contains the correct information from WSDOT’s perspective. The record should include all written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker. Keeping good records and making sure those records (maps, letters, correspondence, comments, traffic impact studies) get into the formal local government “record” should start at the very beginning of a file. It is important to establish a set of best practices to obtain, retain and transmit appropriate information to the local government so that if an appeal does arise, WSDOT is prepared.

7.1.17 Building A Good Record

All correspondence, maps, traffic impact studies, meeting notes and records of conversations are part of WSDOT’s decision-making history. As such, this information should be kept in some logical order so that it can later be made part of the formal local government record.

- Letters and documents for the record. WSDOT staff may submit written information in the form of letters, memoranda, staff reports, recommendations and findings. Be sure to include a request that the written information be made part of the record. This written documentation must be submitted prior to the close of the record. The submittals need to reference how the materials relate to the logical approval criteria for the land use application at hand.
- Public Hearing Testimony. WSDOT staff may also testify in person at hearings and may bring and request to have entered into the record any written material. Again, these must relate to the local approval criteria.
- Record Keeping. WSDOT must keep records of agency correspondence, both internal and external, notices from local jurisdictions, and the local staff reports, findings and decisions. These are a valuable source of information when preparing an appeal.
- Keeping a Journal. Keeping a written record of conversations, internal communications and meeting outcomes can be a valuable tool. The written record of conversations does not have to be word for word, but should note important features such as the subject matter, date and persons talked to. Care should always be taken to keep any journals professional by nature, so that if the material is submitted as part of the local government record, it will not contain entries embarrassing to the writer or to WSDOT.

7.1.18 Important Tips for Building a Record

The following is a list of tips for building a record.

- Establish good record-keeping practices in all cases.
- If the data or information is important to WSDOT, get it in the record. If it is not in the record, it will not be used in the decision-making.
- The local government is the “keeper of the record.” It is up to you to see that the information gets placed into their record.
- Placing information into the record means that you must formally request, either orally at a hearing or as part of any written correspondence, that the information be made part of the record. For example, if information is submitted to the planning commission and then appealed to the city council, make sure that the planning commission record, including your information, is placed before the city council.
- Make sure that any Traffic Impact Analysis (TIA) and any updates are placed in the record. It is often a good idea to request two copies in order to make sure one is available for the record. All of this requires that the Development Services staff member has detailed knowledge about each particular land use application, including local government regulations and hearing dates.